

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ALAN J. GREEN**

Claimant

VS.

**CITY OF WICHITA**

Respondent

Self-Insured

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Docket No. 190,467

**ORDER**

This order will address issues raised in an appeal from an Award entered by Administrative Law Judge Nelsonna Potts Barnes on December 6, 1996, and issues raised in an appeal from a subsequent Order dated January 30, 1997, granting respondent's request to proceed with the review and modification of that Award. The Appeals Board heard oral argument on both appeals May 9, 1997.

**APPEARANCES**

Claimant appeared by his attorney, Gregory D. Bell of Hutchinson, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Edward D. Heath, Jr., of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed the record identified in the Award and has adopted the stipulations listed in the Award. The Appeals Board also considered the transcripts of the evidentiary deposition of Robert Lancaster taken December 30, 1996, and the transcript of the hearing on claimant's objection to the review and modification proceedings.

**ISSUES**

In the appeal from the Award, respondent asked for review of the following issues:

- (1) Whether the Administrative Law Judge erred in refusing to grant respondent's request for an extension of terminal dates.
- (2) Whether claimant's failure to stipulate to an uncontroverted fact constituted fraud and abuse.
- (3) The nature and extent of claimant's disability.

In the appeal from the Award, claimant raised as additional issues:

- (1) The constitutionality of the offset for retirement benefits found in K.S.A. 44-501(h).
- (2) The nature and extent of claimant's disability.

In the appeal from the Order granting leave to proceed with review and modification, claimant contends the Administrative Law Judge exceeded her jurisdiction and/or committed error in allowing respondent to proceed with review and modification under K.S.A. 44-528.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board finds and concludes as follows:

The benefits for which respondent seeks an offset are in the nature of disability benefits rather than retirement, and respondent is, therefore, not entitled to an offset under K.S.A. 44-501(h). This conclusion renders moot issues concerning the extension of terminal dates. This conclusion also renders moot the proposed review and modification based on those benefits.

Claimant worked as a lieutenant with the City of Wichita, Kansas, Fire Department. On November 23, 1993, claimant sustained a back injury while lifting rescue equipment from the back of a fire department vehicle. Claimant received medical care at the direction of John S. Toohey, M.D. Dr. Toohey diagnosed a disc herniation at L5-S1 and, on April 20, 1994, Dr. Toohey performed a partial disc removal. Dr. Toohey released claimant to return to work August 2, 1994, with permanent restrictions. Claimant received what the parties describe as a service connected disability retirement in November 1994.

Respondent asserted at the outset of the litigation it was entitled to an offset for retirement benefits paid to claimant. Before the record was closed, respondent began a deposition of Leeann Casey to establish the amount of that retirement offset. When it

became apparent the witness did not know the information needed, the deposition was adjourned with the expectation that respondent would later introduce appropriate evidence indicating the amount of the retirement benefit and the portion contributed by the employer.

Respondent did not, however, introduce any further evidence before its terminal date ran, but attached an affidavit and other documents to its submission letter. When claimant's counsel objected to introduction of this additional evidence, respondent's counsel requested an extension of the terminal date.

Respondent then filed an application for review and modification, intending to introduce evidence relating to the appropriate amount of the offset. Claimant opposed the application for review and modification and the Administrative Law Judge set the matter for hearing. At the hearing, the Administrative Law Judge addressed the retirement offset as follows:

The Administrative Law Judge concludes that the Respondent is entitled to an offset for early retirement benefits contributed by the Respondent on behalf of the Claimant. However, the amounts of the offset have not been established due to lack of information in the record. Once the Respondent establishes what percentage of Claimant's retirement benefits were provided by the employer, an offset can be allowed for this benefit.

The initial question is whether the benefits are retirement benefits. K.S.A. 44-501(h) provides:

If the employee is receiving . . . retirement benefits from any other retirement system, program or plan which is provided by the employer . . . any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits less any portion of any such retirement benefit . . . that is attributable to payments or contributions made by the employee . . . .

A document titled "Wichita Police & Fire Retirement System" was introduced as Exhibit 2 to the regular hearing. Claimant also testified regarding the benefits. Claimant was 40 years old at the time of the regular hearing. He is entitled to benefits under the plan because of his service connected injury. He is entitled to 75 percent of his salary at the time his salary ceased. At age 55 the benefits are recomputed, and he is then entitled to 75 percent of what his salary would have been had he continued to work.

The circumstances reflect the overlapping nature of the disability and retirement benefits. The same employer and employee contribution funded both the disability and the age-related retirement. Both were invested in and paid out of the same fund. The amount of benefits is based on essentially the same calculation of 75 percent of the salary.

The Appeals Board nevertheless concludes the benefits paid claimant should not be treated as retirement benefits for purposes of K.S.A. 44-501(h). The Board's conclusion is based on what it considers the commonly accepted meaning of the term "retirement benefit." The Board construes "retirement benefit" as a benefit paid by reason of age and/or years of service. Retirement benefits are not dependent on disability. In this case claimant is eligible only because of his injury and disability. In contrast, eligibility for retirement is based only on age and/or years of service.

Since the benefits are not retirement benefits, the issues concerning extension of terminal date are moot. The proposed review and modification also becomes unnecessary. The sole purpose for both was to allow respondent to introduce further evidence relative to the dollar amount of the offset.

The Board also notes that respondent's initial pleadings asserted that claimant's refusal to stipulate to the facts relating to the amount of the offset constituted fraud and abuse. This issue appears to have been abandoned on appeal as it was not argued by counsel. The Board notes no evidence claimant's counsel was ever asked to stipulate.

The Appeals Board agrees with and affirms the finding by the Administrative Law Judge that claimant sustained an 89 percent permanent partial work disability. This conclusion was reached by averaging together two opinions of Dr. Toohey, one based upon a task list prepared by Michael J. Dreiling and the other based on a task list prepared by Karen C. Terrill. The average of those opinions results in a 77.5 percent task loss. The Administrative Law Judge averaged this together, as required by K.S.A. 44-510e, with the 100 percent wage loss to arrive at the 89 percent work disability.

Respondent contends claimant should not be entitled to the 100 percent wage loss because he has retired and removed himself from the open labor market. The Appeals Board disagrees. The record reflects no offer of employment refused by claimant or offer of vocational rehabilitation. Claimant is taking training to become a helicopter pilot and is starting a cattle feeding business, in effect retraining to be able to work within the restrictions.

The Appeals Board therefore affirms the finding by the Administrative Law Judge that claimant sustained an 89 percent work disability.

#### **AWARD**

**WHEREFORE**, the Appeals Board finds and concludes the order denying an extension of terminal dates should be affirmed, the order granting leave to conduct review and modification shall be reversed, and the award of benefits is affirmed.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Alan J. Green,

and against the respondent, City of Wichita, a qualified self-insured, for an accidental injury which occurred November 23, 1993, and based upon an average weekly wage of \$1,035 for 25.14 weeks of temporary total disability compensation at the rate of \$313 per week or \$7,869, followed by 294.35 weeks at the rate of \$313 per week or \$92,131.00, for an 89% permanent partial general disability, making a total award of \$100,000.

As of July 31, 1997, there is due and owing claimant 25.14 weeks of temporary total disability compensation at the rate of \$313 per week or \$7,869, followed by 167.15 weeks of permanent partial compensation at the rate of \$313 per week in the sum of \$52,317.95, for a total of \$60,186.95, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$39,813.05 is to be paid at the rate of \$313 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders in the Award of the Administrative Law Judge not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Gregory D. Bell, Hutchinson, KS  
Edward D. Heath, Jr., Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director